Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2064

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES REYNOLDS AND LOIS A. REYNOLDS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a suit alleging a negligent failure by a Farmers Home Association employee to inspect properly a furnace that caused personal injury is barred by the "misrepresentation exception" to suits allowed against the United States under the Federal Tort Claims Act, 28 U.S.C. 2680(h).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Ausland v. *United States*, 488 F. Supp. 426	8
Bartie v. *United States*, 216 F. Supp. 10, aff'd, 326 F.2d 754, cert. denied, 379 U.S. 852	6
Clark v. *United States*, 218 F.2d 446	6
Diaz Castro v. *United States*, 451 F. Supp. 959	6
Hall v. *United States*, 274 F.2d 69	8
Hicks v. *United States*, 511 F.2d 407	8
Indian Towing Co. v. *United States*, 350 U.S. 61	8
Lloyd v. *Cessna Aircraft Co.*, 429 F. Supp. 181	6
National Manufacturing Co. v. *United States*, 210 F.2d 263, cert. denied, 347 U.S. 964	5
Neal v. *Bergland*, 646 F.2d 1178, petition for rehearing, No. 80-1278 (filed July 13, 1981)	6, 7, 8
United States v. *Neustadt*, 366 U.S. 696	4-5, 6, 7, 8

Statutes and regulations:

Federal Tort Claims Act:	
28 U.S.C. 2674	3
28 U.S..C 2680	4
28 U.S.C. 2680(h)	3, 7
42 U.S.C. (& Supp. III) 1471(a)	2
42 U.S.C. (& Supp. III) 1472	2
42 U.S.C. (& Supp. III) 1487	2

Statutes and regulations (continued): Page

7 C.F.R.:

Section 1804.4 (1980) 2, 6
Section 1804.4(g)(3) (1980) 2
Section 1822.7(a) 2
Section 1924.9 ..... 2, 3

Miscellaneous:

45 Fed. Reg. (1980):

p. 39789 2
p. 39792 3

Restatment (Second) of Torts (1965) 7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2064

CHARLES REYNOLDS AND LOIS A. REYNOLDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 643 F.2d 707. The order of the district court (App., *infra*, 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1981. The petition for a writ of certiorari was filed on June 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Farmers Home Administration (FmHA) is the agency authorized by the Secretary of Agriculture to extend financial assistance to eligible rural residents to help them acquire "decent, safe, and sanitary living conditions." 42 U.S.C. (& Supp. III) 1471(a). FmHA may provide this assistance either by direct loans from the Secretary of Agriculture (42 U.S.C. (& Supp. III) 1472) or by insured or guaranteed loans (42 U.S.C. (& Supp. III) 1487).

Regardless of the form of the assistance, FmHA's regulations declare generally that "[s]upervision will be provided borrowers to the extent necessary to achieve the objectives of the loan and to protect the interests of the Government." 7 C.F.R. 1822.7(a). Specifically, the regulations in effect at all times relevant to this case provided that (7 C.F.R. 1804.4 (g)(3) (1980)):

> The County Supervisor will inspect development work as frequently as necessary to assure that construction and land development conforms with the plans and specifications. He will make a final inspection at the earliest possible date after completion of the planned development.[1]

---

[1] The Department of Agriculture amended the FmHA regulations effective June 12, 1980. 45 Fed. Reg. 39789. Section 1804 was deleted and its substance was reenacted as 7 C.F.R. 1924.9 There was one particularly relevant change made in the regulations. They now provide:

> FmHA's inspections are not to assure the borrower that the house is built in accordance with the plans and specifications. The inspections create or imply no duty or obligation to the particular borrower but are, rather, for the dual purposes of determining that FmHA has adequate security for its loan and enabling FmHA to determine that FmHA is working toward achieving the statutory goal of providing adequate housing.

Approval of construction by the county inspector is a condition precedent to occupancy.

2. Armand and Renee Fourton applied for and received a loan to construct a new residence on their farm land in Taos County, New Mexico. The construction of the house was inspected in accordance with the foregoing regulations by the FmHA's county supervisor. Prior to June 1976, when the Fourtons moved into the new house, the FmHA conducted its final inspection of the completed house and approved the mortgage arrangements submitted by the Fourtons.

In November 1976, petitioner Steven Reynolds was house-sitting for the Fourtons. A natural gas furnace, which was installed during construction, had been connected improperly to a supply of butane gas. This caused carbon monoxide to be discharged into the house. As a consequence, Steven Reynolds suffered carbon monoxide asphyxiation and sustained serious brain damage.

3. On February 9, 1979, petitioners[2] filed the instant action under the Federal Tort Claims Act

---

7 C.F.R. 1924.9. The Department of Agriculture explained the change as follows:

> [E]xisting statutes provide for these construction inspections to be conducted by FmHA personnel solely to determine adequacy of the FmHA security. Language other than that contained in the final rule may create legal problems by not properly informing the public as to the purpose of these inspections.

45 Fed. Reg. 39792 (1980). Thus, the new regulations were intended to clarify preexisting law on this issue.

[2] Steven Reynolds sued individually. His parents, Charles Reynolds and Lois Reynolds, sued on his behalf and individually.

(FTCA), 28 U.S.C. 2674, against the United States in the United States District Court for the District of New Mexico. They alleged that their injuries were proximately caused by the negligent inspection of the Fourtons' house by the county inspector for the FmHA. The government filed a motion for judgment on the pleadings, asserting that the cause of action was barred by the "misrepresentation" exception to the FTCA, 28 U.S.C. 2680(h).[3]

The district court granted the government's motion, holding that the FmHA "owed no duty to inspect for safety to Plaintiff and is, therefore, not liable to Plaintiff as a matter of law" (App., *infra*, 1a). The court of appeals affirmed, concluding that the complaint was barred by the "misrepresentation" exception applicable to suits by private individuals against the United States (Pet. App. 6-10). The court reasoned (*id.* at 6-8) that this result was mandated by *United States* v. *Neustadt*, 366 U.S. 696 (1961), and other federal court decisions construing the "misrepresentation" exception (Pet. App. 9-10).

ARGUMENT

The decision of the court of appeals correctly applied the Federal Tort Claims Act's "misrepresentation" exception as interpreted in *United States* v.

---

[3] The relevant portion of 28 U.S.C. 2680 provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights * * *.

Neustadt, 366 U.S. 696 (1961). Review by this Court therefore is unwarranted.

1. In *Neustadt*, an inspector for the Federal Housing Administration (FHA) failed to discover cracks in the foundation of a house that was financed by the FHA. Plaintiffs alleged and the court of appeals held that FHA breached a "duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely." 366 U.S. at 706. This Court held that the plaintiffs had alleged only "the traditional and commonly understood * * * tort of 'negligent misrepresentation'" and therefore disallowed their claims. *Ibid.* The Court also rejected the argument that the FHA owed a duty to protect the mortgagor based on the statutory requirement of making an inspection and offering an appraisal. *Id.* at 708. It concluded that those requirements were for the benefit of the government, not the purchaser. *Id.* at 708-709.

Petitioners argue that, unlike *Neustadt*, this case involves the duty to use due care in a safety inspection. This characterization of the issue, however, does not alter the gravamen of petitioners' complaint that the FmHA breached a "duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely." That the effects of the FmHA's actions are concededly more serious than those in *Neustadt* does not affect the basic tort theory underlying the complaint.[4] As the Court stated in *Neustadt*:

---

[4] *Neustadt* cited with approval *National Manufacturing Co. v. United States*, 210 F.2d 263 (8th Cir.), cert. denied, 347 U.S. 967 (1954), a case in which the misrepresentation exception was applied to misinformation given by the govern-

> While we do not condone carelessness by government employees in gathering and promulgating such information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability.

Id. at 710-711.

Moreover, petitioners cannot avoid the second holding in *Neustadt* that provision for inspection of housing construction by itself does not create any duty on the part of the government to protect the buyer (or, here, the buyer's invitee). Petitioners have made no showing that the Housing Act of 1949 created a duty to assure that an FmHA-financed house is safe. They rely upon references to "safe" housing in the regulations (7 C.F.R. 1804.4 (1980)), but ignore the fact that the stated purpose of government inspections is "to achieve the objective of the loan program and * * * the protection of [the federal government's] security interest." *Neal* v. *Bergland*, 646 F.2d 1178, 1181 (6th Cir. 1981), petition for rehearing,

---

ment in the form of flood forecasts that allegedly contributed to physical damage to plaintiffs' goods, wares, and merchandise. *United States* v. *Neustadt*, 366 U.S. at 702-703. See also *Clark* v. *United States*, 218 F.2d 446 (9th Cir. 1954) (government agency that inspected embankment and notified residents that they were safe was not liable when embankment collapsed, causing injury and death). See also *Bartie* v. *United States*, 216 F. Supp. 10, 20-21 (W.D. La. 1963), aff'd, 326 F.2d 754 (5th Cir.), cert. denied, 379 U.S. 852 (1964); accord, *Diaz Castro* v. *United States*, 451 F. Supp. 959 (D. P.R. 1978) (misrepresentation exception applied in case of bodily injury); *Lloyd* v. *Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977) (misrepresentation exception applied in wrongful death action resulting from plane crash).

No. 80-1278 (filed July 13, 1981). It is the developer or builder, not the federal government, who must assume the duty to protect the mortgagor's financial and physical well being.

2. Relying primarily upon the decision of the Sixth Circuit in *Neal* v. *Bergland, supra*, petitioners argue (Pet. 6-7) that there is a conflict among the courts of appeals on the proper application of Section 2680(h). In *Neal*, the court of appeals held that the misrepresentation exception does not bar a suit by a mortgagor against the United States alleging that the FmHA negligently inspected and supervised construction of a house. The Court reasoned that the "good Samaritan" rule described in the *Restatement (Second) of Torts* § 323 (1965)[5] creates a basis for liability that is distinct from negligent misrepresentation. From this premise, the court concluded that a suit based on an alleged breach of a gratuitous duty to inspect was not barred by Section 2680(h).

The error in the Sixth Circuit's analysis is that *Neustadt* by necessary implication rejected the argument that failure by a government agency to in-

---

[5] The *Restatment* defines the rule as follows:

> § 323. Negligent Performance of Undertaking to Render Services.
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertakings, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

spect and disclose defects is actionable under a "good Samaritan" theory despite the misrepresentation exception. The classic illustration of the "good Samaritan" rule is *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). In that case, the Coast Guard gratuitously operated a lighthouse beacon and negligently allowed it to stop operating. This Court held that the Coast Guard was liable for the injuries it caused. The Court in *Neustadt* distinguished *Indian Towing* on the ground that the activity that caused the injury could not fairly be characterized as a "misrepresentation." See *United States* v. *Neustadt, supra*, 366 U.S. at 711 n.26. In this case, as in *Neal*, the essence of the claim is negligent misrepresentation resulting from the failure of the FmHA to discover and disclose the defect in the building.

We therefore acknowledge the existence of a conflict between the Tenth Circuit's decision in this case and the Sixth Circuit's decision in *Neal*,[8] but submit

---

[8] The other cases relied upon by petitioners (Pet. 8) are readily distinguishable on their facts. In each case, the applicability of the misrepresentation exception turned on whether the substance of the plaintiff's claim was reliance on misinformation by the government. See *Hicks* v. *United States*, 511 F.2d 407, 414 (D.C. Cir. 1975) (misrepresentation exception not applied since "basis for the claim" was government's independent responsibility in discharge of dangerous patient from hospital); *Ausland* v. *United States*, 488 F. Supp. 426, 431 (N.D.S.D. 1980) (misrepresentation exception not applied since United States actually sold plaintiffs contaminated grain); *Hall* v. *United States*, 274 F.2d 69, 71 (10th Cir. 1959) (exception applied since gravamen of complaint was that government had given plaintiffs misinformation on health of cattle after Department of Agriculture testing).

that the Sixth Circuit's decision is plainly inconsistent with this Court's decision in *Neustadt*. The government has filed a petition for rehearing en banc in the *Neal* case. Accordingly, there is no need at this time for the Court to resolve the conflict. There will be ample opportunity to decide this issue if the Sixth Circuit should deny the government's petition for rehearing en banc.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

AUGUST 1981

---

[7] We also note that, in light of the clarifying amendments to the regulations regarding FmHA inspections that have been adopted by the Department of Agriculture (see note 1, *supra*), it is doubtful that plaintiffs in the future will file suits against the FmHA claiming that they relied upon its inspections to protect their interests.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. CIV-79-135 C

CHARLES REYNOLDS and LOIS A. REYNOLDS, his wife, as individuals and as parents and next friends of STEVEN REYNOLDS and STEVEN REYNOLDS, individually, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT.

Filed Aug. 28, 1979

ORDER

THIS MATTER having come before the Court on Defendant's Motion for Judgment on the Pleadings filed June 15, 1979, and the Court having reviewed the pleadings and memoranda on file and being otherwise fully advised in the premises, concludes that Defendant, through the Farmers Home Administration, owed no duty to inspect for safety to Plaintiff[s] and is, therefore, not liable to Plaintiff[s] as a matter of law;

IT IS, THEREFORE, ORDERED that Defendant's Motion for Judgment on the Pleadings be, and it hereby is, granted.

/s/ Santiago E. Campos
SANTIAGO E. CAMPOS
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 351748 577